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THE USURIOUS LOANS BILL.

We believe there is little difference of opinion as to the necessity for empowering Courts to grant relief of the kind contemplated by this measure. But we have serious misgivings as to the degree of success likely to be achieved by the proposals in the bill now published. The days of *laissez faire* and freedom of contract have admittedly passed away. But the difficulty is how to secure uniformity and certainty in the exercise by courts of indefinite powers vested in them to relieve against the contracts of parties. The Legislature is not prepared to fix anything like a maximum rate of interest and we admit that that is scarcely desirable even if possible, for, it will certainly not be fair to fix a rate of interest without reference to the circumstances of particular transactions. It must also be recognised on the other hand that the Legislature may run the risk of defeating its own purpose if the new situation created is such that money lenders may be unduly deterred from advancing loans to needy persons of small means. It is therefore inevitable that some discretion must be left to Courts to fix the appropriate compensation that a creditor may be allowed in each particular case though even from reported cases one could see that the standard is apt to vary as with the proverbial Chancellor's foot.

Though based on S. 1 of the English Money Lenders' Act the bill attempts to facilitate the task of Courts in this country by furnishing in sub-clauses (a) to (d), of clause (2) certain standards and criteria by which to judge of the nature of the transaction in question and decide the measure of relief to be afforded. These to some extent meet some of the difficulties pointed out in the English cases dealing with the Money Lenders' Act. There is however one provision in the bill, which, in spite of the fact that it has the precedent of the English Act, seems to us inexpedient: we refer to

the provision empowering the court to order repayment of sums already received by the creditor. It is one thing to say that the courts should not help a creditor to enforce an unconscionable transaction, but a very different thing to invest the court with powers to enforce morality by compelling people to disgorge what they may have received by unfair means. If the court is to start on such a campaign of morality we do not know whether money lenders are the only persons to be so dealt with, for there are many other kinds of speculators who deserve to be brought under this kind of censorship. We cannot help feeling that borrowers, at any rate after they have borrowed, do not always behave in a manner that may command the sympathy of all and the proposed provision may put it in their power to harass their quondam creditors as much out of other motives as with a real sense of hardship suffered by themselves. There is nothing inherently immoral in a person receiving what he has stipulated for and the fact that the debtor has actually paid the amount may be taken as some indication both of his ability to pay and of his own feeling that the transaction was not grossly unfair. Further, the bill does not fix any period or other limit with reference to which the accounts of transactions between the parties are to be reopened and we do not know if any provision of the law of limitation will apply to fix a limit for the purpose. Dealing with the corresponding clause in the English Act, the Court of Appeal in *Saunders* v *Newbould*[1] held that in any particular proceeding only so much of the account between the parties must be reopened as may be 'relevant to the transaction in respect of which the suit is brought'; but they left the question open as to the propriety of opening up other settled accounts in other appropriate proceedings. In the House of Lords, the Lord Chancellor left this part of the decree of the Court of Appeal as it was. In India the Dekhan Agriculturists Relief Act provides for enquiry into 'the history of the case from the commencement of the transactions between the parties*** out of which the suit has arisen'; but that Act does not go the length of compelling a refund of sums received by the creditor (cf. *Janoji* v. *Janoji* [2], *Ramachandra Baba Sathi* v. *Janardan Apaji* [3] and *Mugappa* v. *Mahomed Saheb* [4]; but see, *Dhondi Bin Ranoji* v. *Revappa Satappa*[5]. It is conceivable that the money lender himself

1. (1905) L. R. 1 Ch 260
2. (1882) I. L. R. 7 B. 185.
3. (1889) I. L R 14 B. 19
4. (1909) I. L. R. 34 B. 260.
5. (1917) I. L. R. 41 B. 453

might have suffered losses or otherwise become reduced in circumstances and it would be a great hardship in such a case to call upon him to pay back moneys which he might have received and spent years ago. The law well knows cases in which a person is not allowed to enforce a transaction but is yet allowed to retain benefits received by him thereunder as *e.g.* voluntary payments in respect of barred debts, payments in respect of transactions declared void by S. 257 (A) of the Civil Procedure Code etc. and there is no morality in helping a person to go back upon a contract which he himself has chosen to perform. We would therefore strongly recommend the omission of the provision in question.

The Bill as it stands makes provision for the powers under it being exercised in any proceeding "for the recovery of a loan or for the enforcement of any agreement or security etc." This would confine the beneficent operation of the measure to cases in which the creditor comes forward as the *plaintiff* and the general provision in cl. (4) does not carry the matter any further, while clause (3) is confined to insolvency proceedings. We see no reason why the court should not be able to exercise the like powers in proceedings initiated by the debtor himself as *e.g.* in a suit for redemption, or even in special suits like those provided for in cl. (2) of S. 1 of the English Act and S. 3 of the Dekhan Agriculturists-Relief Act.

With reference to the local application of the measure, it seems to us undesirable to limit it to particular portions of the country. If in any locality the remedial powers conferred by the Act are not required because of the non-prevalence of the class of transactions meant to be struck at, the formal applicability of the Act to such locality would give rise to no serious trouble, whereas, if the Act is to be in force in one part of the country but not in an adjacent locality, it is bound to give rise to complications. Difficult questions may arise as to the law governing a particular transaction *viz*, whether it is the *lex fori* or the *lex loci contractus*. or (where the loan is secured on immoveable property) the *lex sitae*; it may also encourage unhealthy attempts at evading the law by one party or the other, by making it appear that the transaction was entered into in one place rather than in another and there is no reason or principle for discriminating

between contracts entered into in one locality and those entered into elsewhere. We would also recommend the omission of such words in cl. (2) as give the Act a retrospective operation in so far as there may be an agreement or security given *after* the Act though the loan itself might have been borrowed *before* the commencement of the Act. It is the contract of loan that must be the basis of the rights of the parties and if that is to be left unaffected by the later Act, there is no reason why the mere fact of security being taken after the Act, should involve a different result.

USURIOUS LOANS BILL.

Bill to give additional powers to Courts to deal in certain cases with usurious loan of money or grain.

Whereas it is expedient to give additional powers to courts to deal in certain cases with usurious loans of money or grain. It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Usurious Loans Act, 191 .

(2) It extends to the whole of British India.

(3) The Local Government may, by notification in the local official gazette, direct that it shall come into force in the whole or any part of the province from such date as it may specify in its notification.

Re-opening of transaction.

2. Where, in any proceeding, *ex parte* or otherwise, for the recovery of a loan whether of money or of grain made after the commencement of this Act, or for the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of any such loan made either before or after the commencemnt of this Act, the Court is satisfied by evidence that the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise, is excessive, and the transaction was as between the parties thereto substantially unfair, the Court

may reopen the transaction and take an account between the parties; and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of such excess, and if any such excess has been paid or returned or allowed in account, the court may order the creditor to repay any sum which the court considers to be repayable in respect thereof, and may set aside either wholly or in part or revise or alter any security given or agreement made in respect of any such loan, and if the creditor has parted with the security, may order him to indemnify the debtor in such manner and to such extent as the court may deem just.

(2) (a) In this section "excessive" means in excess of that which the court deems to be reasonable having regard to the risk incurred as it appeared or must be taken to have appeared to the creditor at the date of the loan and to the ordinary rate prevailing in the locality for loans of like character.

(b) In considering whether a return is excessive under this section the Court shall take into account any sums charged or paid for expenses, inquiries, fines, bonuses, premia, renewals, or any other charges, and if compound interest is charged, the periods at which it is calculated and the total advantage which the creditor may reasonably be taken to have expected from the transaction.

(c) In considering the question of risk the Court shall take into account the presence or absence of security and the value thereof, if any, the financial condition of the debtor and the result of any previous money transactions of the debtor so far as the same were known or must be taken to have been known to the creditor.

(*d*) In considering whether a transaction was substantially unfair the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known or must be taken to have been known to the creditor and the rate of interest charged.

3. On any application relating to the admission or amount of a proof for money lent in any insolvency proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of a money loan.

4. This section shall apply to any proceeding whatever its form may be, if such proceeding is substantially one for the enforcement of any agreement or security in respect of any such loan.

5. Nothing in this section shall affect the rights of any *bona fide* transferee or holder for value without notice.

6. Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.